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No. 87-652

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALBERTA GAS CHEMICALS LIMITED, ET AL., PETITIONERS

v.

E. I. DUPONT DE NEMOURS AND COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

This case arises from the 1981 acquisition of respondent Conoco, Inc., by respondent E. I. DuPont de Nemours and Co. (DuPont). Petitioners, who are competitors of DuPont in the production of methanol, alleged that prior to the merger Conoco had developed plans to become a producer of methanol and had intended, in connection with efforts to stimulate demand for its anticipated production, to make large methanol purchases. They further alleged that after the merger DuPont did not carry out those plans, depriving petitioners of the opportunity to sell to Conoco and to reap the benefits of the increased demand. In addition, petitioners alleged that, because of the vertical integration of DuPont and Conoco, petitioners were foreclosed from making methanol sales to Conoco. The case presents three questions:

1. Whether petitioners have standing under Section 4 of the Clayton Act, 15 U.S.C. 15, to recover damages purportedly arising from the decision not to pursue Conoco's plan to stimulate demand for methanol.

2. Whether petitioners have standing under Section 16 of the Clayton Act, 15 U.S.C. 26, to seek injunctive relief, either because respondents cancelled Conoco's marketing plans, or because Conoco was eliminated as a prospective methanol producer, thereby increasing DuPont's dominance in the market.

3. Whether, in rejecting petitioners' foreclosure claim, the court of appeals improperly ignored the sales that petitioners allegedly would have made to Conoco had Conoco carried out its plan to make large methanol purchases.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners—Alberta Gas Chemicals, Ltd., a Canadian firm, and Alberta Gas Chemicals, Inc., its New Jersey subsidiary—are producers of methanol, a chemical used in the manufacture of such products as formaldehyde, plywood, particle board, and plastics. In the highly concentrated United States "merchant market" for methanol (the market for methanol not used by the producing company in its own manufacturing), petitioners' sales accounted for about 7% in 1981. Respondent E. I. DuPont de Nemours and Co. (DuPont) was at that time

the largest domestic producer of methanol, recording sales of about 30% of the merchant market. Prior to 1981, respondent Conoco, Inc., was an international energy company owning the largest coal reserves in the United States and was also a purchaser of methanol for use in its chemical and plastic manufacturing plants in New Jersey and Louisiana. In 1980 Conoco's purchases of methanol (about half of which came from DuPont) represented approximately 1.8% of the total merchant market sales in the United States (Pet. App. A22). Conoco purchased methanol from petitioners in the late 1970s, but by 1981 it was no longer one of petitioners' methanol customers. *Id.* at A3-A5.

Although methanol is ordinarily manufactured from natural gas, studies have demonstrated that coal may be used to generate the product, through a gasification and liquefaction process. During the 1970s and early 1980s, when crude oil prices rose sharply, companies began to experiment with coal to produce synthetic fuels. Prior to 1981, Conoco had considered becoming a methanol producer through the construction of a large gasification facility. Pet. App. A4.

In 1981, DuPont acquired Conoco in a transaction involving consideration of approximately 7.8 billion dollars. Prior to the acquisition, the Department of Justice conducted an investigation into all aspects of the proposed transaction. The Department objected to the proposed transaction on grounds not at issue here and withdrew its objection after the transaction was restructured to alleviate the Department's concerns. After the merger, Conoco cancelled its plans to develop a coal gasification facility. It also sold its chemical plant in Louisiana and dismantled the one in New Jersey. By 1984, Conoco's methanol purchases were minimal. Pet. App. A2, A4, C3.

2. On September 25, 1981, five days before DuPont's acquisition of Conoco was to become effective, petitioners

brought an action against respondents in the United States District Court for the District of New Jersey, alleging that the merger violated Section 7 of the Clayton Act, 15 U.S.C. (& Supp. IV) 18, because it "may substantially lessen competition" in the United States market for methanol. Pet. App. A2, A5. Petitioners advanced two claims.

First, petitioners alleged that, had Conoco carried out its plans to become a methanol producer, it would first have taken steps to stimulate market demand for the product. In connection with doing so, petitioners asserted, Conoco had intended to make large purchases of methanol, prior to beginning its own production of the chemical. Petitioners contended that, as methanol producers, they would have made substantial sales to Conoco during this period prior to Conoco production. Moreover, petitioners asserted, they would have benefited in the longer run from the increased market demand for methanol that Conoco had intended to stimulate. They alleged that, following the merger, DuPont jettisoned Conoco's plans and thereby injured petitioners. Pet. App. A4-A5.

Second, petitioners alleged that, but for the merger, they would have made methanol sales to Conoco for its chemical plants in New Jersey and Louisiana. After the merger, petitioners contended, Conoco filled some of its methanol needs from DuPont and other companies but made no purchases from Alberta. Pet. App. A5.

On June 5, 1986, after extensive discovery, the district court granted summary judgment in respondents' favor with respect to petitioners' first claim but denied summary judgment with respect to the second claim (Pet. App. B1-B12). For purposes of the motion, the court assumed that the acquisition of Conoco violated Section 7 of the

Clayton Act and that petitioners had been injured in the ways that they had alleged. But relying on this Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the district court held that the injuries purportedly caused by respondents' decision to discontinue Conoco's production and marketing plans did not constitute "antitrust injury" and were therefore "not cognizable under § 4 of the Clayton Act" (Pet. App. B6). The court explained (*id.* at B9, citing *Brunswick*, 429 U.S. at 488) that a plaintiff may not sue for damages unless he can show injury "caused not merely 'by reason of an unlawful acquisition, but by reason of that which made the acquisition unlawful.' " Under that standard, the court held, petitioners lacked standing to collect damages arising from respondents' decision not to pursue Conoco's "demand-creation" plans. The court stated (Pet. App. B11) that "[i]t should be immediately obvious that this alleged injury bears absolutely no relationship to the aspect of the merger which is said to make it illegal under § 7, that is, that it lessens competition in the methanol industry." Rather, the court explained (*ibid.*), the injury claimed by petitioners as a result of the termination of Conoco's plans "is completely unconnected to DuPont's methanol-producing capacity. It would have occurred had any acquirer of Conoco chosen to terminate those plans * * *."

Thereafter, on September 3, 1986, the district court granted a further summary judgment, rejecting petitioners' remaining claim for damages arising from the foreclosure of Conoco as a methanol purchaser (Pet. App. C1-C6). The court explained that "two undisputed facts" required that result. "The first fact is that since the merger DuPont has divested or shut down the methanol-consuming operations it acquired from Conoco. The sec-

ond fact is that even before the merger Conoco had no plans to purchase methanol from [petitioners]." *Id.* at C3. The court concluded (*id.* at C5) that "[o]n this record, there is no possibility that [petitioners] will be able to show damages from any lost sales due to the merger." Finally, having found that petitioners lacked standing to sue for damages, the district court rejected for the same reason their claim for injunctive relief.

3. The court of appeals affirmed by a divided vote, holding that petitioners lacked standing to sue either for damages or for injunctive relief (Pet. App. A1-A45). Like the district court, the court of appeals assumed arguendo (*id.* at A8, A13-A14) that the merger was unlawful under the Clayton Act, and it likewise assumed that petitioners had been injured in the manner they alleged. But applying the rule in *Brunswick,* the court explained that "to recover treble damages for a § 7 violation, plaintiffs must prove more than harm causally linked to an illegal presence in the market. Rather, they must establish antitrust injury – 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.' " *Id.* at A11 (quoting *Brunswick,* 429 U.S. at 489). The court of appeals concluded that petitioners did not satisfy that standard.

In reaching that conclusion, the court first rejected (Pet. App. A13-A19) the "horizontal" claims based on the cancellation of Conoco's demand-creation plan. Those injuries, the court explained (*id.* at A14 (citation omitted)), "do not flow 'from that which makes the defendants' acts unlawful' " because they "were neither connected with, nor resulted from, DuPont's market power in the methanol-producing industry." In particular, the court stated (*ibid.*), "the same harm would have occurred had any acquirer decided to curtail Conoco's production and marketing plans." The court observed (*id.* at A15 (em-

phasis in original; footnote omitted)) that "Conoco's status as a potential competitor in the methanol merchant market is irrelevant to [petitioners'] theory of injury. [Petitioners'] alleged injuries flow not from the elimination of Conoco as a potential competitor, but from the loss of Conoco as a future *consumer* of methanol." The court said (*id.* at A15-A16):

> While in this case there may be some connection between Conoco's plan to become a competitor and its plan to consume more methanol in the future, the former plan is really only coincidental to the harm which [petitioners] supposedly sustained. In a challenge to a horizontal merger, a private plaintiff must show that it was injured because the acquiring and the acquired firms are competitors in a field of commerce. It is not enough to demonstrate that, by happenstance, the merging firms are competitors or potential competitors.[1]

The court next held (Pet. App. A19-A26) that petitioners' vertical claim—that the merger had foreclosed them from making methanol sales to Conoco—failed to state an antitrust violation because any such foreclosure was trivial. The court observed (*id.* at A23-A24 (footnote omitted)) that "[s]ince the merger, [petitioners] ha[ve] freely sold to the rest of the merchant market and indeed ha[ve] increased [their] annual sales in the United States from 38 million gallons in 1980 to 64 million gallons in

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[1] The court also stated that petitioners' allegation—that they were injured as a result of the decision not to pursue Conoco's marketing plans—was simply a claim that petitioners had been "denied sales and profits from an increase in demand—essentially windfall profits." The court noted that the antitrust laws "do not award damages or equitable relief for losses stemming from the failure of a competitor to bring about an increase in demand and price." Pet. App. A17.

1984 and 83 million gallons in 1985." As the court read the record, moreover, "the merger foreclosed less than 1% of the market" (*id.* at A23 (footnote omitted)). Noting (*id.* at A20) that "de minimis foreclosure of a market is not an antitrust dereliction in itself," the court concluded (*id.* at A25 (footnote omitted)) that "because of its de minimis consequences, the DuPont acquisition and subsequent foreclosure of Conoco purchases from [petitioners] does not establish a § 7 violation."

Having found that petitioners failed to allege antitrust injury from an antitrust violation, and therefore lacked standing to sue for damages under Section 4 of the Clayton Act, 15 U.S.C. 15, the court then rejected petitioners' prayer for injunctive relief under Section 16 of the Act, 15 U.S.C. 26. The court explained (Pet. App. A26) that "[f]or the reasons that [petitioners'] treble damage claims fail under *Brunswick*, summary judgment is appropriate for DuPont on [petitioners'] claims for injunctive relief as well."

Judge Becker dissented (Pet. App. A27-A45). Although, in his view, petitioners' legal theory was "not the most believable story about the conduct of rational actors in the marketplace" (*id.* at A28), Judge Becker concluded that petitioners had adequately alleged that respondents' decision to terminate Conoco's marketing plans both eliminated a procompetitive change in the market for methanol and injured petitioners' business. In his view (*id.* at A36-A37 n.6), the challenged merger was illegal precisely because DuPont discontinued Conoco's plans and hence, under *Brunswick*, "[t]he thing which made the merger illegal is * * * the thing which caused [petitioners'] injury." Judge Becker also took issue (*id.* at A38-A40) with the court's disposition of petitioners' vertical claim that they had been foreclosed from making

methanol sales to Conoco. As he understood the court's decision, the majority's conclusion that the claimed injury was de minimis was erroneous, because the majority had neglected to consider the sales that petitioners would have made to Conoco if Conoco had pursued its marketing plans.[2]

DISCUSSION

Petitioners, facing the obstacles posed by this Court's decisions to the standing of a competitor to challenge a merger, have evolved a set of assumptions (described by Judge Becker as "not the most believable story" (Pet. App. A28)) under which, they allege, the DuPont-Conoco merger was both anticompetitive and harmful to them as competing producers of methanol. The court of appeals'

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[2] Judge Becker briefly considered (Pet. App. A40-A44) the question whether petitioners could base their claim on an "actual potential competition" theory – a question that this Court addressed but did not resolve in *United States* v. *Marine Bancorporation*, 418 U.S. 602, 632-633, 639 (1974). Under that theory, a merger may be declared unlawful under the Clayton Act where "1. the relevant market is oligopolistic; 2. absent the acquisition, the acquiring firm would have entered the market in the near future either *de novo* or through acquisition of a little company; and 3. such entry by the acquiring firm carried a substantial likelihood of ultimately producing deconcentration of the market or other significant procompetitive effects" (Pet. App. A43). While Judge Becker recognized that the present case offers a "slightly different" issue – in that the acquired company, and not the acquirer, was prepared to enter the market prior to the merger – Judge Becker concluded that there was a sufficient basis to proceed to trial on that theory. Since the petition does not present the question of actual potential competition, and the case was dismissed on other grounds, there is no reason to consider the actual potential competition question in this case.

rejection of petitioners' theory is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court is unwarranted.

1. Petitioners first contend (Pet. 12-20) that the court of appeals misapplied the *Brunswick* case in rejecting their "horizontal" claim that they suffered antitrust injury as a result of the cancellation of Conoco's plan to enter into production and marketing of methanol. In *Brunswick*, a group of bowling center owners sought damages on account of the defendant's acquisition of several of their competitors. The plaintiffs claimed that they had been injured by the acquisitions because, absent the acquisitions, the competitors would have gone out of business. This Court held that plaintiffs lacked standing to challenge the acquisition because their complaint was in essence that they had been deprived of the benefits of decreased competition, a claim "inimical to the purposes" of the antitrust laws. 429 U.S. at 488. Noting that "[e]very merger * * * has the potential for producing economic readjustments that adversely affect some persons" (*id.* at 487), and that the antitrust laws "were enacted for 'the protection of *competition,* not *competitors*' " (*id.* at 488 (emphasis in original; citation omitted)), the Court rejected the contention that every injury "causally linked to an illegal presence in the market" (*id.* at 489) is sufficient to support recovery. Instead, a plaintiff is required to establish "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful" (*ibid.* (emphasis in original)). See also *Associated Gen. Contractors of California, Inc.* v. *California State Council of Carpenters,* 459 U.S. 519, 540 (1983); *Blue Shield* v. *McCready,* 457 U.S. 465, 478 (1982).

The *Brunswick* case confirms the principle that "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972); accord *Associated Gen. Contractors,* 459 U.S. at 534. "An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy"; but it is "reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property" (*Blue Shield,* 457 U.S. at 476-477). Put another way, a plaintiff must show more than that he was injured " 'by reason of' the unlawful acquisitions"; he must show that he was injured " 'by reason of' that which made the acquisitions unlawful" (*Brunswick,* 429 U.S. at 488).

While petitioners' claim is more ingenious than the plaintiffs' claim in *Brunswick,* it, too, ultimately does not rest on injury "that flows from that which makes defendants' acts unlawful" (429 U.S. at 489). In the first place, petitioners do not and cannot complain of being injured by the elimination of Conoco as a potential competing producer of methanol. The court of appeals assumed arguendo, as had the district court (see Pet. App. B11), that the acquisition violated Section 7 of the Clayton Act "because it enabled DuPont to bar Conoco from entering the methanol-producing industry as an independent competitor" (Pet. App. A13-A14 (footnote omitted)). But as the court of appeals explained (*id.* at A14 n.4), petitioners "do not, and could not, complain about the ultimate effect of the merger – the prevention of a competitor's entry into

the market." Petitioners thus do not allege an injury resulting from the "loss of competition between DuPont and Conoco after the latter's entry into the market as a producer" (*id.* at A14).[3]

Instead, petitioners argue that the entry of Conoco into production would have *benefited* them because it would have been accompanied by a program to increase demand that would have raised prices to the benefit of all producers: the merger injured them, they say, because "[t]he elimination of Conoco as a competitor automatically eliminated the need for, and the ability to accomplish, an increase in demand for methanol as a fuel" (Pet. 16). But petitioners have not alleged any reason why the merger changed the competitive situation so as to make the alchemy by which Conoco was supposedly planning to increase both supply and price no longer economically attractive. As the court of appeals suggested (Pet. App.

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[3] Judge Becker assumed that it was the cancellation of the coal gasification project that *made* the acquisition illegal (Pet. App. A37 n.6), and he therefore concluded that injuries alleged to result from the cancellation of the project would flow, in the *Brunswick* sense, from that which made the transaction illegal. But apart from the fact that petitioners never asserted any such theory of illegality, Judge Becker's reasoning cannot be right. A merger's legality depends on its effect on market structure. *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963). While a merger may be unlawful because the resulting change in market structure increases the likelihood that industry output will be reduced and prices increased, legality cannot turn on whether output is actually reduced. And here, where a necessary assumption of petitioners' case is that Conoco's plans would have increased both demand and price, there has been no plausible suggestion why the change in market structure resulting from the merger would make termination of the plans to expand output any more likely. See note 4, *infra*. In any event, petitioners' injury resulted not from a change in output, but rather from the failure of demand and price to increase.

A16), if Conoco's plan had made economic sense immediately before the merger, there is no reason why the merged company had any less incentive to carry it out. Conversely, a decision that the coal gasification project did not make economic sense could have been made by anyone in charge of Conoco and was not "inevitably" caused by, and "inextricably intertwined with," the decision to merge the two companies (*Blue Shield,* 457 U.S. at 483, 484).[4] Petitioners' alleged injuries therefore do not "reflect the anticompetitive effect * * * of the violation" (*Brunswick*, 429 U.S. at 489).

Nor do petitioners' injuries "reflect the anticompetitive effect * * * of anticompetitive acts made possible by the

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[4] In fact, cancellation of the demand creation plans is properly viewed as an action taken by DuPont following the acquisition of Conoco, rather than as an integral part of the acquisition, because the reason for the cancellation must have been a business judgment about the likely profitability of the gasification project, not a change in conditions brought about by the merger. Petitioners assume that the effect of Conoco's plan to increase industry output would be to *increase* the demand for and the price of methanol. If that assumption were correct, it would be wholly irrational for DuPont to have cancelled the plan. Despite Judge Becker's attempt to posit a "set of facts under which it would make economic sense for DuPont to behave as [petitioner] alleges it did" (Pet. App. A29), the only plausible explanation of DuPont's behavior is that DuPont did *not* think there would be sufficient additional demand to make the project worthwhile. Judge Becker hypothesizes that DuPont may have been realizing monopoly rents that could fall as a result of increased competition, despite a *higher* selling price for methanol (*id.* at A29-A30). But DuPont's methanol profits would not fall on Judge Becker's posited facts, except on the further assumption, not made by Judge Becker, that DuPont's total cost of producing methanol would for some reason increase by more than its revenues increased. In short, an increase in demand that increased the price of methanol would have benefited DuPont – unless, after acquiring Conoco, DuPont discovered that the Conoco plans were not economically sound.

violation" (*Brunswick*, 429 U.S. at 489). Unlike the plaintiff in *Blue Shield*, whose damages resulted from an alleged conspiracy to injure competition in the market for psychological services, petitioners' injuries stem not from anti-competitive behavior, but only from respondents' decision not to pursue a program of creating enlarged demand so they could sell the output of their coal gasification project. Even assuming that this program and project would have managed to benefit both competition and petitioners as a competing producer, the antitrust laws impose no general duty to promote competition; they simply forbid engaging in anti-competitive activity. See, *e.g.*, *Olympia Equip. Leasing Co.* v. *Western Union Tel. Co.*, 797 F.2d 370, 375-376 (7th Cir. 1986), cert. denied, No. 86-1255 (Mar. 23, 1987); *USM Corp.* v. *SPS Technologies, Inc.*, 694 F.2d 505, 512-513 (7th Cir. 1982), cert. denied, 462 U.S. 1107 (1983). In sum, petitioners cannot have been injured by the failure of a competitor to add productive capacity, and they have not shown how any other effect on them would constitute "antitrust injury" sufficient to give them standing to object to a merger under Section 7.

2. Petitioners next contend (Pet. 21-26) that the court of appeals misapplied this Court's decision in *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, No. 85-473 (Dec. 9, 1986), in rejecting their claim for injunctive relief. In the *Cargill* case, the Court held that the requirement of antitrust injury under *Brunswick* applies to actions for injunctive relief under Section 16 of the Clayton Act as well as to actions for damages under Section 4 of the Act. As the Court put it, "in order to seek injunctive relief under § 16, a private plaintiff must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful' " (slip op. 9 (quoting *Brunswick*, 429 U.S. at

489)). The court below, applying that standard, held that petitioners' request for injunctive relief fails "[f]or the reasons that [their] treble damage claims fail under *Brunswick*" (Pet. App. A26). To the extent that petitioners are alleging the same underlying injury for purposes of both damages and injunctive relief, the court's decision is obviously correct.

Petitioners suggest, as an alternative basis for injunctive relief, that "[i]f Conoco were permitted to become an independent major methanol producer, the concentration in the methanol industry would be reduced and DuPont's dominance in the market would be diminished" (Pet. 21). As with the plaintiff in *Cargill,* however, it is not clear why petitioners would be injured by increased concentration in the industry. To be sure, increased concentration might make it more likely that firms in the market would be able to charge supracompetitive prices, and thus threaten "antitrust injury" to customers. But no customer felt sufficiently threatened to sue in this case. As the court of appeals recognized (Pet. App. A18), petitioners, unlike methanol customers, would be helped, not hurt, if prices rose above a competitive level. The threat (if any) that the acquisition would lead to supracompetitive pricing was not a threat to petitioners, which therefore could not assert standing on that basis. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 593 (1986); see *Allen* v. *Wright,* 468 U.S. 737 (1984); *Warth* v. *Seldin,* 422 U.S. 490 (1975). Petitioners now suggest (Pet. 21) that, had Conoco entered the market as an independent producer, DuPont would not have been able to make "use of threat and intimidation" in an effort to coerce customers not to purchase methanol from petitioners. Petitioners made that contention only vaguely in their brief below (see Appellants Br. 35), and the court of appeals did not address

it. The contention is not properly presented for this Court's review. See *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam).[5]

3. Petitioners assert, finally, that, in rejecting their claim regarding the foreclosure of future sales to Conoco, the court of appeals "totally ignored" the contention that Conoco would have made sizeable purchases from petitioners, had Conoco been permitted to carry out its plan to stimulate demand (Pet. 26-28). As a result, petitioners argue (*ibid.*), the court below erroneously dismissed their foreclosure claim as de minimis. But like Judge Becker in his dissenting opinion (see Pet. App. A38-A40), petitioners misread the court's opinion. The court of appeals specifically considered the claim that Conoco would have made large purchases from petitioners had its demand-creation plans been executed (see *id.* at A13). It rejected that claim, however, for the same reasons stated above: there is no alleged or plausible explanation of the cancellation that makes it an anticompetitive effect of the merger (see *id.* at A13-A19). It was not the demand-creation claim

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[5] Petitioners' reliance (Pet. 10-11 & n.8) on *Cia. Petrolera Caribe, Inc.* v. *Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985), and *Christian Schmidt Brewing Co.* v. *G. Heileman Brewing Co.*, 753 F.2d 1354 (6th Cir.), cert. dismissed, 469 U.S. 1200 (1985), is misplaced. In *Cia. Petrolera*, a gasoline wholesaler challenged a merger that it claimed would increase concentration in the industry and create a price "squeeze" (754 F.2d at 407). In *Christian Schmidt Brewing*, two brewing companies challenged the merger of two other brewing firms, alleging that the merger might permit predatory practices. It is not at all clear that either of those cases remains good authority after this Court's decision in *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, No. 85-473 (Dec. 9, 1986). Moreover, neither case stands for the proposition that competitors have standing to challenge a merger regardless of whether they are threatened with antitrust injury (see Pet. 10-11), for in each case the court found a sufficient allegation of antitrust injury.

that the court of appeals dismissed as "de minimis". Rather, the court used that characterization in rejecting the allegation, not renewed in the petition, that by virtue of vertical integration, petitioners had been foreclosed from selling methanol to Conoco for use in its existing chemical plants. See *id.* at A19-A26. Petitioners do not challenge the conclusion that *that* alleged foreclosure – resulting from the vertical integration of DuPont and Conoco – constituted less than 1% of the merchant market for methanol (see *id.* at A22-A23) and, for that reason, was de minimis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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